VANDERBILT UNIVERSITY

Associate Provost for Research
and Graduate Education

October 12, 2005

Defense Acquisitions Regulations Council
Attn: Ms. Amy Williams
OUSD (AT&L) DPAP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

RE: Comments – DFARS Case 2004 - D010

Dear Ms. Williams:

Vanderbilt University's position is that there is no compelling need for the additional regulatory action proposed for comment in DFARS Case 2004 – D010. The U.S. Department of Commerce (DOC), through its Export Administration Regulations (EAR), implements the requirements of the Export Administration Act of 1979. The U.S. Department of State (DOS), through its International Traffic in Arms Regulations (ITAR), implements the requirements of the Arms Export Control Act. Other than the important consultative roles expressed for the U.S. Department of Defense (DOD) in these laws and regulations, the DOD appears to lack statutory authority to either interpret or enforce export control law. The existing EAR and ITAR regulations provide ample protections to safeguard export controlled information, technology, and goods. DOD export-control rulemaking should be limited to referring DOD contractors to their obligation to obey U.S. export-control laws and regulations and to directing DOD personnel in the proper fulfillment of any attendant responsibilities under those laws and regulations.

The DOD's critical mission of protecting classified research, information, and technology through the National Industrial Security Program (NISP), established under the authority of E.O.12829, is well recognized and supported by universities that engage in classified research. The DOD Office of Inspector General's (OIG) report released in March, 2004, which stimulated this proposed DFARS rulemaking, "*Export-Controlled Technology at Contractor, University, and Federally Funded Research and Development Center Facilities (D-2004-061)*", seems to rely upon the NISP program and its operational manual (NISPOM) to support an expanded DOD role in the enforcement and, more importantly, management of unclassified export-controlled information and technology. This position taken by the OIG leads to a 'NISP-like' management regimen for governing unclassified, export-controlled information and technology. Ironically, this would make the requirements for DOD contractors performing some unclassified work *more stringent* than for those performing work under the umbra of 'classification'. For instance, the NISPOM permits appropriate flexibility in the use of control regimens like 'badging' and 'segregated facilities'; the proposed DFARS rule would make them mandatory. The well-crafted NISPOM security requirements used to protect the country's classified research, information, and technology rely upon the EAR

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and ITAR regulations and their respective management controls to address export control security concerns. The introduction of confusing and redundant new rules into the already complicated environment of export control regulation will strain severely the very limited resources available to America's universities to comply with the evolving interpretations of EAR and ITAR regulations and the unnecessary administrative and financial burdens they impose.

Guidance to DOD personnel charged with implementing the proposed DFARS additions is imprecise and, thereby, would encourage its arbitrary inclusion in all DOD contracts. Contracting Officers and 'requiring activities' will err on the side of caution by including the clause based solely on speculation. To be frank, this is symptomatic of the 'hot-potato' issue export control administration represents for anyone who comes in contact with it – no one feels comfortable holding the potato, so each in turn passes it down to the next level to avoid being burned. This results in all of the burden and liability for export-control administration being shifted to the end recipient, even when shared responsibility is clearly called for among all parties – government, business, and subcontractors. When universities are the intended end-recipients, there is a mismatch. Their representatives face contract negotiators who believe it is a university's obligation to accept certain burdens, risks and constraints that are inappropriate for public-domain, non-profit organizations. How can universities maintain the high standard of original, productive research and scholarship that has made their success the envy of the world while sacrificing openness, arguably the very essence of what has made that success possible?

EAR and ITAR do not currently contain provisions requiring speculation on or control of the potential generation of export-controlled information or technology. DOD's desire to do this through the proposed DFARS rule is alarming because it focuses on the control of information and technology which doesn't yet exist. This represents a dramatic departure from the current administration's stated policy on free and open dissemination of information set forth in NSDD-189. And, it is unworkable in any open, academic research environment.

The proposed requirement for ". . . registration in accordance with International Traffic in Arms Regulations" is an excessive and inappropriate measure for an EAR controlled technology. Registration with the Department of State itself, while appearing not to be a huge administrative burden, also requires the development of an export control plan (ECP) for university campuses, something that would have significant administrative, financial, and 'cultural' implications. First, an ECP, if it is to be effective, must be campus-wide – it cannot be restricted in its implementation to the single DOD contract that could trigger it. Sprinkled throughout the proposed DFARS is language that makes clear the intent to use this rulemaking to expand campus-based controls – 'badging', for example, would seem to be pretty ineffective as a control tool unless all those who might have access to, or be exposed to, export-controlled information wore badges. On research university campuses, this would be virtually everyone. Second, the administrative structure for monitoring and administering an ECP is not currently part of most university budgets. Guidance available from the DOS for the creation of effective ECPs is geared toward industry, with its *much* higher indirect-cost reimbursement rates. Unfortunately, this proposed rule references and cross-references other agencies' regulations, it picks and chooses restrictions out of their EAR and ITAR regulatory contexts, and pays little attention to how the resulting ensemble is to be implemented. The likely scenario for agency guidance under these circumstances is to go with what you know, namely the DOS/ECP guidance for industry. Universities are very supportive of the research

conducted by their faculty. But when faced with the unrecoverable administrative costs (i.e., indirect costs) associated with implementing and maintaining an ECP, costs that would have to be covered from other sources, universities with only a handful of DOD contracts might have no choice but to decline any future DOD contracts to avoid risks and costs that have the potential to compromise other institutional missions. Finally, and certainly not of least importance, are the 'badging' and segregation requirements of this proposed DFARS rule. Any requirement to badge faculty, staff, students, and campus visitors because, just possibly, they might come into contact with EAR-controlled technology as they toured campus facilities, attended classes, or visited with colleagues, in essence, would be a requirement to turn universities into something very different than they are today. Would parents be willing to send students to universities where the presence of DOD contracts subjects their sons and daughters to potential legal action for being improperly badged or for crossing paths with certain technologies without proper authorization?

SEGREGATION. The term 'segregated work areas' can be viewed from several perspectives, however, in the end, it comes down to prohibiting an individual from doing something that others can do in a public-domain, not-for-profit institution. Title VI of the Civil Rights Act of 1964, Title VII of the Civil Rights Act of 1964, and Executive Order 11246 (1965) would seem to prohibit the kind of segregation implied by this proposed regulatory change. Even if this kind of action were legal, the cost of complying with such a regulatory requirement in an open academic environment would be significant. Badging, monitoring, and securing dual-use equipment from the 'visual inspection' of faculty, staff, students, and visitors from restricted countries would carry significant costs, both financial and cultural. Such demands are of particular concern when applied to dual-use technologies controlled by the Commerce Control List (CCL). Presumably, if malevolent intent is the objective and the resources were available, many of these CCL technologies could be purchased by foreign nationals in the United States and visually inspected, at leisure, in greater detail, and in a setting much less open to observation than a university laboratory.

The proposed DFARS clause does not address the 'fundamental research exclusion' (FRE) provided in both the EAR and ITAR. Contracting officers and the 'requiring activity' must be able to interpret and apply rules in ways appropriate to the circumstances of the research to be conducted. The clause ignores the FRE and lists the only three acceptable access avenues for export controlled information as license, other authorization, or exemption. The FRE is a prominent feature in both EAR and ITAR regulations. Apparently, the deliberations leading to the FRE's inclusion in both documents revealed and addressed the common understanding that open research environments are key to quality results and that routine restriction of research undermines and threatens that quality. The tenor of both NSDD-189 and E.O. 12958 is that restrictions should be used judiciously and that classification is the appropriate administrative tool for insuring security. The FRE establishes important criteria for determining when the restrictive licensing requirements of EAR and ITAR should be implemented.

This proposed regulation contains many specific requirements that will be costly to universities – badging, segregated spaces, training, etc. A plastic badge is not very expensive; the administrative apparatus to monitor the process leading to the issuance of the badge *is* expensive. Regulations speak volumes in what they don't say. Their impact lies not just in the actions expressly required but in the many implied shifts in policy, direction,

and perspective they impose. At Vanderbilt University, the implementation of the proposed DFARS regulation would:

- ◊ require an assessment of how to satisfy the monitoring demands for dual-use equipment found ubiquitously in 522,000 square feet of research space, in 13 buildings, on a 330 acre campus, where that research space is interspersed with classrooms, offices, and public access spaces.

- ◊ require an assessment of the impact of the proposed rule on the non-DoD research culture of our campus. Vanderbilt University attracts students and scholars from around the world. The students come to learn in the open environment we provide for them. The scholars come to confer and exchange ideas with their colleagues. The best students and world-class scholars will pass us (and perhaps U.S. universities, in general) by if their presence on our campus will be governed by suspicion and restriction. Opportunities for open interaction and research abound elsewhere; it is unlikely that any foreign scholar seeking to avoid repression would seek engagement with any U.S. institution that could offer no better option.

- ◊ require an assessment of the affordability of new staff and new programs necessary to manage the hidden burden of the proposed rule.

Recommendation. If the null-option suggested in the first paragraph of this letter is not possible, then Vanderbilt University endorses the re-draft of the proposed rule submitted by the Council on Governmental Relations (COGR) in its response to DFARS Case 2004 - D010.

Over the last 60 years, America's colleges and universities have enjoyed a dynamic, stimulating, and highly productive research relationship with the Department of Defense. No country can even begin to approach the success record of this collaboration. At times, American colleges and universities have gladly accommodated situations where collaboration in support of America's security could not be conducted in an open academic environment. And, the Department of Defense has shown incredible support for free and open research in a very broad spectrum of America's colleges and universities during these six decades of advancement. Now is not the time to abandon the mutual scientific respect and prowess we share to policies and processes that cripple our productive collaboration. The scientists and engineers of America's 3,000 colleges and universities represent an intellectual force *par excellence*. They are America's arsenal against fearful misuses of science and technology. Their collective power thrives in openness.

Sincerely,

Dennis G. Hall

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cc: Senator Lamar Alexander
Representative Jim Cooper